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717-667—61

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 614

VINCENT IGLESIAS ARMADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 124–126) and the court of appeals (Pet. App. 1–12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1963 (R. 148; Pet. App. 13–14), and a petition for rehearing was denied on September 12, 1963 (R. 170; Pet. App. 15). On October 7, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 11, 1963. The petition was filed on November 12, 1963.[1] The

[1] The petition was timely since November 11 is Veterans Day, a national holiday.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether government agents, having probable cause to believe that an automobile contained contraband, could search it when they found it parked, and with petitioner standing beside it, in the driveway of a hotel.

2. Whether petitioner, who disclaimed standing to object in the courts below and denied that he had any interest in the premises or property observed, may now complain of the search of the room of an absconded co-defendant.

STATEMENT

Petitioner was convicted, after a jury trial in the United States District Court for the Southern District of Florida, on three substantive counts charging that on or about July 17, 1961, he and a co-defendant, Hilda Nora Bostizano, concealed more than four pounds of unlawfully imported cocaine, in violation of 21 U.S.C. 174 (count 3); facilitated the transportation of the drug, in violation of 21 U.S.C. 174 (count 4); and purchased the drug not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (count 5) (R. 4–7).[2] Petitioner was also convicted on count 6, which charged that from July 15 to July 17, 1961, he and Mrs. Bostizano conspired to commit the substantive offenses. Mrs. Bostizano

[2] Counts one and two charged Mrs. Bostizano alone with illegal importation of the drug on July 15, 1961.

failed to appear for trial and her bond was forfeited (R. 13). Petitioner was given concurrent sentences of imprisonment for five years and was fined $2,500 on each count (R. 8–10).

Petitioner's pre-trial motion to suppress the narcotics found in his car on July 17, 1961 (R. 131–132), was denied without prejudice to renewal at the time of trial (R. 14). The motion was renewed when the case was called for trial and the court heard extensive testimony before denying it again (R. 14, 124–126). That testimony may be summarized as follows:

On July 15, 1961, at about 9:30 p.m., customs agent Knierin learned from two telephone conversations with a customs inspector at Miami International Airport that a suspect, Mrs. Bostizano, a known associate of petitioner, had left the baggage room without being stopped by government agents and was on the street (R. 95, 99). Agents Knierin and Fickie went to the office of the United States Customs Agent where they examined the government file on petitioner and Mrs. Bostizano (R. 100–101). The agents traced Mrs. Bostizano to Room 609 of the Everglades Hotel, and they rented a room across the hall (R. 102–103). On July 16 at about 3:30 p.m., without a search warrant, the agents entered Mrs. Bostizano's hotel room, searched a large and small suitcase,[3] and found two plastic bags containing what appeared to be cocaine in a false bottom of the small suitcase. The agents did not remove the bags and glued the fabric back to

[3] The agents had a description of the two suitcases before they came through customs inspection (R. 64).

the false bottom (R. 103–108, 111). Agent Knierin discussed what he had seen in the suitcase with agents Fickie, Romano, and Doughney (R. 108–109, 115). Agent Knierin also reported to agent Romano that the file revealed that Mrs. Bostizano had been placed on the suspect list because of association in South America with dealers who produced cocaine and with petitioner Armada. It had been long suspected that petitioner was involved in bringing cocaine from South America to the United States by use of women couriers (R. 109–111).

On the morning of July 17, 1961, Mrs. Bostizano told the hotel bellman that she wanted her suitcase repaired and asked that he bring it down to the lobby (R. 19–23). The doorman saw petitioner pick up the suitcase, place it in the trunk of his car, and drive off with Mrs. Bostizano (R. 48–50). The doorman gave an agent the license number and make of the car, the police put out an "all points" bulletin at about 11:00 a.m., and several agents joined in the search for the car (R. 55, 115–117). Petitioner returned to the hotel in his car about an hour later. The doorman told agent Doughney, "Here comes your party now," and Doughney informed agent Romano of this (R. 35, 55–56, 115). At about 12:15 p.m., Romano identified himself to petitioner, who was standing in the driveway, asked what petitioner had done with the suitcase, and whether he would open the trunk of his car. Petitioner stated that the suitcase was in the car and opened the trunk (R. 27–28, 36–37, 83–84). He said, "Everything that is in the trunk of

the car is mine" (R. 29). Romano and Doughney searched the two suitcases, the smaller of which was inside the larger, but discovered nothing (R. 29, 37–39, 41–42). Agents Fickie and Knierin were called. Fickie discovered in the false bottom of the small suitcase the two plastic bags containing the white substance, later identified at the trial as cocaine (R. 29–30, 32, 43, 67, 78). Petitioner was then placed under arrest (R. 30, 43, 68–69, 72).

With respect to the testimony describing the search of Mrs. Bostizano's room, petitioner's counsel stated that he realized that he could not object to the search on behalf of petitioner without claiming a proprietary interest, which he did not assert, but that "some manner of objection" ought to be available to petitioner. He moved that the testimony as to what was observed in the room be stricken as "not binding on us [and] * * * irrelevant and immaterial." The court denied the motion (R. 111–113; see R. 128).

Petitioner testified on direct examination that Mrs. Bostizano put her suitcase in his car because she wanted the handle fixed and that he did not know what was in it (R. 81–82). When he told the agents everything in the car was his, he did not mean to refer to the suitcase since the agents already knew that it was hers (R. 84).

ARGUMENT

1. This Court held in *Carroll* v. *United States*, 267 U.S. 132, that law enforcement officers may search automobiles, as well as other means of transportation, for contraband on the basis of probable cause without

a search warrant. Accord, *Brinegar* v. *United States*, 338 U.S. 160; *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251. The district court found that probable cause existed (R. 125) and the court of appeals agreed (Pet. App. 9–12). Petitioner, however, contends (Pet. 11–12) that, even if there was probable cause for the search of his automobile, the search without a warrant was invalid because the car was not in motion, having come to a stop in the driveway of the hotel when he returned there after having left with the suitcases.

As the courts below pointed out (R. 124–125; Pet. App. 11–12), the agents had no way of knowing how long petitioner intended to leave his car in the driveway. Unless the agents stopped the automobile, took the keys, or arrested petitioner, the car might have been gone long before the agents could obtain a warrant. A car does not lose its character as a movable vehicle just because it comes to a temporary stop. Thus, in *Scher* v. *United States*, this Court cited the *Carroll* decision in upholding the search of an automobile parked in the suspect's garage, made without a warrant on probable cause, when the suspect was approached as he was leaving the automobile. Except that the car was at a hotel rather than his own home, the circumstances in this case are virtually identical. See also *Husty* v. *United States*, *supra*, 282 U.S. at 701.

2. In the court of appeals, as in the district court, petitioner failed to complain of the search of Mrs.

Bostizano's hotel room on July 16, 1961.[4] His sole contention was that the search of his car on July 17 was not justified under the *Carroll* case. Petitioner now asserts (Pet. 7–10) for the first time in this Court that the narcotics seized in the search of his car should have been suppressed because the search of Mrs. Bostizano's room was illegal. He reasons that the search of his own automobile was invalid because part of the probable cause on which the agents acted in searching the car was derived from their search of Mrs. Bostizano's room. The underlying and essential premise of this argument is that petitioner has standing to challenge the validity of the search of Mrs. Bostizano's room.

Petitioner's contention must be rejected because it was not the basis of his motion to suppress in the district court. His only objection to the testimony concerning the agents' observations in the course of their search of Mrs. Bostizano's room was that it was "irrelevant and immaterial" to the issues at the trial (R. 113, 128). That argument raised a purely legal question. On the other hand, petitioner's belated claim that the search of the room was invalid depends on the answer to a factual question: whether petitioner had an interest in the room, the suitcase, or the narcotics at the time the room was searched. If he had none, petitioner would clearly have had no standing to challenge the search of the room.

[4] The court of appeals stated (Pet. App. 10): "He has no standing to raise and does not in fact question the legality of that search. See *Jones* v. *United States*, 1960, 362 U.S. 257, 261, *et seq.*"

Issues may be raised for the first time on appeal only in exceptional cases where the error is clear. *E.g., Silber* v. *United States,* 370 U.S. 717; *United States* v. *Atkinson,* 297 U.S. 157, 166. More pointedly, as we have seen, the error here, if there be any, is not clear since factual issues bearing upon the question of his standing were not presented to the district court or resolved by it. It is well settled in cases involving search and seizure that if a party never had the opportunity to present evidence on certain issues because the other party failed to present them in the trial court, the latter is foreclosed by his failure. *United States* v. *Di Re,* 332 U.S. 581, 588; *Giordenello* v. *United States,* 357 U.S. 480, 487–488. These principles are particularly applicable to new contentions raised by the defendant here since the burden of proof is on the one challenging the legality of a search and seizure. *Lotto* v. *United States,* 157 F. 2d 623, 626 (C.A. 8), certiorari denied, 330 U.S. 811; *Schnitzer* v. *United States,* 77 F. 2d 233, 235 (C.A. 8); cf. *Nardone* v. *United States,* 308 U.S. 338, 341. It is unnecessary to go further.

Assuming that petitioner could attack the constitutionality of the search of Mrs. Bostizano's room in this Court for the first time, it appears that there are two bases on which petitioner might conceivably assert standing. First, he could have had a property interest in the room when the search took place, in the suitcases which were there, or in the narcotics themselves. For example, it would have been sufficient if petitioner had been present as a guest in

Mrs. Bostizano's room at the time of the search. *Jones* v. *United States*, 362 U.S. 257, 265–267. Second, a defendant has standing to challenge the search and seizure of narcotics without alleging that they are his, when such an assertion would be an admission of the crime of which he is charged. "The same element * * * which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Jones* v. *United States*, *supra*, 362 U.S. at 263. But, as this Court made clear in *Wong Sun* v. *United States*, 371 U.S. 471, 492, the *Jones* decision did not confer standing to attack a search upon one whose right of privacy of person or premises had not been invaded.

Petitioner has satisfied neither basis for standing. First, at the hearing on his motion to suppress, his counsel said that petitioner was not asserting any interest in Mrs. Bostizano's room (R. 111–113, 128). Petitioner clearly indicated at the hearing that the suitcase was Mrs. Bostizano's and said that he did not know what was in it (R. 81–82). Petitioner did not indicate at any time during the hearing that he had any interest in the room, the suitcases, or the narcotics. The government was under no obligation to disprove that which was never claimed.

As to the second criterion for standing, it is true, as petitioner argues (Pet. 7–9), that, if the narcotics had been seized in the search of Mrs. Bostizano's

room on July 16 *and* if petitioner had been charged with their possession on July 16, he could have had standing to challenge the legality of the search under the *Jones* decision. Petitioner would then have been confronted with the dilemma which the *Jones* decision removed—if he admitted possession of the narcotics in order to challenge their search and seizure, he would likewise have been admitting that he was guilty of the crime charged. However, the dilemma would exist only if, as in *Jones,* petitioner moved to suppress without expressing whether he had or did not have any interest in the narcotics. Here, in contrast, as we have seen (p. 9), he affirmatively indicated that he had no interest in them. Since petitioner acknowledged that his interests were not involved in the search of the room, he has no standing to challenge it.[5]

Petitioner also argues (Pet. 10–11) that he should have standing to object to the search because Mrs. Bostizano, if she had appeared for trial, would have

[5] We also note that petitioner was not charged with possession of the narcotics on July 16. The substantive counts (3, 4, and 5 (R. 4–5)) charged that the offenses were committed "on or about July 17, 1961." Although count 6 charged a conspiracy between petitioner and Mrs. Bostizano beginning on July 15, the date of the illegal importation, and continuing through July 17, petitioner was not charged with conspiring with Mrs. Bostizano to import cocaine. The offenses charged in the conspiracy count were to receive, conceal, and facilitate the transportation of the unlawfully imported cocaine and to barter, sell, and transfer it without the required order forms. The only overt acts charged related to the events of July 17, the day of the transfer from Mrs. Bostizano to petitioner, *i.e.*, after the search of Mrs. Bostizano's room.

had standing to move to suppress testimony by the agents as to what they saw in her room. *McDonald* v. *United States,* 335 U.S. 451, 456, upon which petitioner relies, held, to be sure, that the conviction of two co-defendants jointly tried must be reversed where a motion to suppress and return evidence filed by a defendant with standing was erroneously denied. This holding does not support petitioner's contention for two reasons.

First, the holding in *McDonald* depends upon the fact that "[i]f the property had been returned to McDonald, it would not have been available for use at the trial." *Ibid.* Thus, the evidence could not have been used by the government against the defendant without standing, even if the defendant without standing was tried separately. Here, in contrast, the cocaine was contraband which was not returnable to Mrs. Bostizano even assuming that Mrs. Bostizano moved to suppress on the ground that it was illegally seized and this motion was granted. It therefore would have been available for use against petitioner at a separate trial.

Second, even if *McDonald* is construed more broadly—that, whether the evidence is returnable or not, the government cannot benefit as to one defendant from the trial court's erroneous ruling on another defendant's motion—petitioner's contention is without merit. *McDonald* does not hold that a defendant otherwise without standing acquires it because another defendant possesses it, so that the former might independently move to suppress even though the defendant with standing chose for some reason not to do so.

Consequently, *McDonald* does not support petitioner's contention that he had standing because Mrs. Bostizano might have had a valid claim if she had appeared for trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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